Supreme Court, U.S.
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No. 99-2035

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER,

v.

LEATHERMAN TOOL GROUP, INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Contrary to Respondent's contentions, this case provides the Court with the perfect opportunity to reconcile the deep divisions among appellate courts over the proper standard for reviewing due process challenges to the excessiveness of punitive damage awards. The issue was squarely presented to the Ninth Circuit and is now properly before this Court. Furthermore, an independent, *de novo* review of the undisputed facts here compels the conclusion that the punitive damages imposed by the jury and perfunctorily affirmed by the district court are so excessive as to violate the standards set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

I. Petitioner Adequately Raised Standard of Review Issue in the Ninth Circuit

It is difficult to understand how Respondent can argue in good faith that Petitioner is raising the standard of review issue for the first time in this Court. Petitioner explicitly addressed this matter in its Ninth Circuit opening brief. The relevant passage, in fact, is conveniently reproduced by Respondent in full in its opposition brief. (Opp. at 8).

Notwithstanding Petitioner's urging below that a *de novo* standard be applied to the punitive damages issue, Respondent advances here a waiver argument due to Petitioner's failure in the Ninth Circuit to (1) delineate a distinct review standard for its state law and federal constitutional attacks on the award, and (2) cite an on-point case in support of a *de novo* standard. Respondent's argument has no merit. There can be no mistake that Petitioner's Ninth Circuit brief sought *de novo* review on *both* the company's state law and federal constitutional challenges; repetitive rhetoric was unnecessary. *See Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1050 n.15 (9th Cir. 1999) (no obligation to give an issue

"extensive" treatment in order to avoid abandonment). Nor is there any requirement that an appellant buttress its legal argument with the most relevant published opinion in order to properly preserve the issue.

More to the point, Respondent well understood and fully appreciated that Petitioner was promulgating a *de novo* review standard on the appellate court, and it thus responded by arguing for abuse-of-discretion review. (Appellee's Br. at 5). The issue was, therefore, plainly raised and joined in the Ninth Circuit. Without articulating any reasoned explanation for its ruling, the court below adopted Respondent's position. (App. 4a). The court of appeals' decision to take up the matter is, standing alone, enough to permit review in the Supreme Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (embracing disjunctive rule under which writ of certiorari may be granted if the question presented was *either* pressed by a litigant *or* passed upon by the court below).

II. Resolution of Circuit Split on Appropriate Standard of Review is Ripe for Supreme Court Determination

As described at length in both the initial petition and the brief of *amici curiae*, appellate courts are clearly divided over the proper standard of review for evaluating alleged constitutional excessiveness in punitive damage awards. While acknowledging the circuit split, Respondent maintains that Supreme Court precedent clearly signals an abuse of discretion standard in this context. (Opp. at 10-11). This contention sorely misreads the decisions of this Court. None of the cases cited by Respondent examined the proper scope of appellate review in due process challenges to the excessiveness of punitive damage awards. The Court, in fact, made clear in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994), that the issue remains open. The excerpted quotations in Respondent's brief all pertain to general limitations on punitive damages; they do not focus on, let alone decide,

the requisite degree of appellate review. The very division among the circuits on the issue underscores the fallacy of Respondent's argument.

Respondent also suggests that this Court's intervention would be premature because the issue purportedly has not been "sufficiently considered" by federal appellate courts. (Opp. at 9-10). The problem, according to Respondent, is that no circuit has explicitly rejected another circuit's review standard while reciting its own approach. This rather bizarre observation does not cast out the circuit split, but instead, reflects a basic lack of appreciation for the policy considerations underlying the Supreme Court's evaluation of petitions for certiorari.

The presence of a circuit conflict on an important legal question represents one of the primary circumstances in which this Court traditionally exercises its discretionary jurisdiction. *See* Sup. Ct. Rule 10(a). Resolution of the division helps minimize the balkanization of the federal judiciary by ensuring that the particular legal rights at stake are accorded uniform and proper appellate treatment. Similarly, the Court's plenary review facilitates the rigorous enforcement of statutory and constitutional rights.

The fact that the various courts of appeals may have reached their differing results under abbreviated analyses is no reason for the Supreme Court to allow the conflict to continue to fester. Indeed, particularly in this era of growing summary dispositions by federal circuit courts, "it is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the court below might have relied on" in reaching its decision. *Lawrence v. Chater*, 516 U.S. 163, 170 (1996) (per curiam) (emphasis and internal alteration omitted).

Furthermore, there are a number of explanations why an appellate court opinion might neither cite nor discuss con-

flicting rulings from other jurisdictions. A court, for example, may be unaware of the split. The burgeoning dockets in many circuits render it difficult for judges to keep track of the latest jurisprudence in their *own* court, let alone that of sister tribunals. Nowhere is this more evident than the Ninth Circuit, where intra-circuit conflicts are omnipresent. Even if a court is aware of the split, however, general notions of comity may counsel against the explicit repudiation of another circuit's reasoning. In addition, little is accomplished by referencing an appellate conflict on an issue which, like the one here, most courts have disposed of in summary fashion. Nevertheless, the often outcome-determinative division remains real and cries out for Supreme Court guidance.

III. This Case is Particularly Well Suited for Resolving the Circuit Split on Appropriate Standard of Review

The punitive damages imposed against Petitioner here would never have survived judicial scrutiny in any circuit applying a *de novo* standard of review. Only the most deferential review, unencumbered by a faithful adherence to the guideposts established by this Court, could sustain this exceedingly disproportionate award. The Ninth Circuit unquestionably employed just such a standard. The case at bar, therefore, presents the Court with the perfect opportunity to clarify the proper review standard on Due Process Clause challenges to the excessiveness of punitive damages.

A. Reprehensibility of Petitioner's Conduct

Nothing in Respondent's opposition brief undermines Petitioner's core claim that its actions bore none of the aggravating factors associated with particularly reprehensible conduct—the benchmark for a punitive damage award. *See Gore*, 517 U.S. at 575. Respondent does not dispute that its

damages were wholly economic and amounted only to the small number of sales it purportedly lost to consumers purchasing Petitioner's Toolzall. Respondent merely emphasizes that Petitioner's decision not to retrieve all marketing materials depicting the modified Leatherman Pocket Survival Tool ("PST") resulted in the improper use of those materials subsequent to the injunction.[1]

This assertion critically ignores the accepted fact that Petitioner had voluntarily withdrawn its Toolzall from the marketplace in October 1996—nearly two months before the injunction issued. (Tr. 733). Thus, the tool pictured in the challenged ads was at no time available for sale to consumers following entry of the injunction. Accordingly, there was no prospect that Respondent could have sustained any conceivable damages from the post-injunction display of those materials.

Nor can Respondent get any mileage out of its questionable passing reference to Petitioner's stipulation to judgment on Respondent's copyright infringement claim. (Opp. at 3, 13). This cause of action is manifestly of no relevancy here. The issue was never presented to the jury and, therefore, could not possibly have formed the basis of any component of the punitive damages award. In fact, the parties in their stipulation agreed that Respondent suffered no damages from the copyright infringement. (Dkt. # 289).

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[1] The initial petition stated that the district court described as "inadvertent" Petitioner's failure to ensure the withdrawal of all post-injunction modified PST advertisements. Respondent correctly clarifies that the district court's phrase was, more accurately, "*arguably* inadvertent." (Opp. at 13) (emphasis added). There was no attempt by counsel to mislead. Whether "inadvertent" or "arguably inadvertent," the essential point is that Petitioner's post-injunction conduct clearly cannot be characterized as so reprehensible as to justify a substantial punitive damages award.

B. Ratio of Punitive Damages to Compensatory Damages

Respondent's brief also provides no satisfactory answer for the unconstitutional excessiveness of the 90:1 ratio between the jury's compensatory and punitive damage award. The essential point it makes on this issue is that the ratio is inflated because Petitioner's false advertisements *potentially* could have caused a substantial amount of additional injuries. Specifically, Respondent suggests that, but for its prompt filing of the lawsuit and procurement of a preliminary injunction, confused consumers would have bought Petitioner's Toolzall in lieu of a PST, thereby eroding a significant percentage of its sales. (Opp. at 15).

Respondent's theory contradicts the Ninth Circuit's legal conclusions. Its factual predicate—*i.e.*, that Petitioner acted unlawfully by copying Respondent's PST and selling a similar product under its own name—while successfully advanced at trial, was squarely rejected by the court of appeals. (App. 7a-16a). The Ninth Circuit held that Respondent had no protected rights in its PST, and that any entity was free to copy it. Accordingly, Respondent would be entitled to no redress for any market share diminution (or conjectured diminution) attributable to consumer purchases of Petitioner's Toolzall.

Respondent's further claim that consumers would be confused by Petitioner's advertisements is similarly at odds with the undisputed facts and express Ninth Circuit findings. Petitioner never represented that its product had any relationship to the PST or to Respondent. Indeed, not only did the controverted ads clearly delineate the manufacturer of the tool, (ER 83-84), but the court of appeals noted definitively that customers purchasing Petitioner's Toolzall would have received exactly that for which they paid. (App. 3a). The court added that Petitioner's use of the modified PST did not "involve the same sort of potential harm to [Respondent] or

to customers as that which may arise from traditional passing off." (App. 3a-4a).

C. Comparable Civil Penalties

Finally, Respondent's references to Oregon's Unlawful Trade Practices Act are totally unavailing. Petitioner agrees that the statute's authorization of the State to seek $25,000 penalties for "willful" violations of an injunction issued under the Act underscores the State's interest in minimizing unlawful trade practices. But, as noted in the initial petition, the jury's finding of malice here was based solely on conduct *preceding* imposition of the injunction. There is thus no room for the fanciful suggestion that Petitioner can be deemed to have willfully violated an injunction (to which it had voluntarily stipulated) by disseminating false advertisements for a product that it had taken off the market months before the injunction issued.

D. Plenary Review is Warranted

In sum, Respondent's efforts to finesse the grossly excessive punitive award cannot be reconciled with the record and must be rejected. Respondent's opposition brief accomplishes nothing other than to distort the record and attempt to demonize Petitioner with irrelevant facts. These tactics accentuate the mischief in an overly deferential review of due process challenges to punitive damage awards.

An independent and dispassionate *de novo* appellate review would have exposed the glaring vulnerabilities in Respondent's arguments. The Ninth Circuit, however, eschewed such an analysis and opted to view the legal issue of gross excessiveness solely through the narrow prism of the district court's one-sentence factual findings. (App. 3a, 24a). *Amici* outlined the risks associated with this approach, (*Amici* at 2, 13-15), and those prophecies were fulfilled in the instant action. Indeed, the result was the sanctioning of an irrational

jury verdict under the guise of trial court discretion, and the discarding of essential due process safeguards against the imposition of punitive damages predicated on bias or passion.

Too often, the protections of the Due Process Clause against excessive punitive damages are eclipsed by overheated rhetoric and the caprice of individual juries and trial court judges. By granting review in this case and mandating a considered, *de novo* standard of appellate review, the Supreme Court can ensure that the guideposts established in *Gore* are faithfully enforced and thereby restore rationality to the award of punitive damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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